MOHAMED BIN MYDDIN v. GAN KIM KENG

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.] August 10, 1974]

[Federal Court Civil Appeal No. 56 of 1973]

Landlord and Tenant — Whether premises controlled premises — Renovation or re-erection — Pleadings — Control of Rent Ordinance, 1956.

In this case the plaintiff had claimed possession of a shophouse of which she was the landlord. The defence was that the shophouse was built before 1948 and that therefore the premises were controlled premises. The President of the Sessions Court found that the shophouse was an entirely new building and gave judgment for the plaintiff. An appeal to the High Court was dismissed and the appellant appealed to the Federal Court.

Held, dismissing the appeal: on the pleadings the only issue for trial was whether the shophouse was completed after 31st January 1948 (in which case it was not subject to the Control of Rent Ordinance, 1956) or on or before that day (in which case it was so subject) and on this issue it would be wrong of the court to disturb the learned President's finding that the shop was a new building completed after 31st January 1948.

Cases referred to:-

(1) *Mohamed bin Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 284.

(2) *Leong Yoong* v. *Lee Sam Yong* [1968] 2 M.L.J. 72.

(3) *Philips* v. *Barnette* [1922] 1 K.B. 222.

(4) *Tioh Kuoi Lan* v. *Ismailjee* [1972] 1 M.L.J. 64.

FEDERAL COURT.

A. Gomez for the appellant.

Datuk H. L. Wrigglesworth for the respondent.

Suffian L.P.: The plaintiff is the landlord of a shophouse, No. 7 Jalan Ulu Market, Tanah Merah, Kelantan. She won judgment for possession in the Tanah Merah Sessions Court. She died and her administrator won again when the defendant/tenant appealed to the High Court at Kota Bharu. The tenant has appealed to us.

There are many grounds of appeal, but before dealing with them it is necessary to bear in mind that pleadings control a trial and an appeal, and it would therefore be desirable to examine the pleadings that were before the Sessions Court.

The plaintiff pleaded that she was the landlord of this shophouse; that the defendant was her tenant at a monthly rental of $90; that she sent the defendant a notice dated 22nd February, 1965, terminating the tenancy on 31st March, 1965; and that the tenant refused to vacate, whereupon the plaintiff prays for vacant possession and damages.

Now how did the defendant plead to this claim? He admitted that he was the tenant of the shophouse at the rent stated by the plaintiff, that he received the notice to quit, but he claimed that the shophouse was built before 1948, that he had been in possession of it and of the land on which it stands as a tenant since before 1948, and that therefore "he is in lawful possession as a tenant under the provisions of the Control of Rent Ordinance, 1956" and that the claim should be dismissed.

On these pleadings I would have thought that the issue for trial was simply this: was the shophouse a new building completed after 31st January, 1948 (in which case it is not subject to the Control of Rent Ordinance, 1956) or on or before that date (in which case it is so subject)? Indeed that was the very issue agreed by Datuk Wrigglesworth for the plaintiff and Datuk S. P. Seenivasagam for the tenant and recorded by the learned President at the commencement of the trial in the Sessions Court.

In the event the learned President found in the evidence that the shophouse was "an entirely new building" completed after 31st January, 1948, and gave judgment for the landlord.

As regards the first ground of appeal, whether or not the shophouse was a new building completed after 31st January, 1948, is a question of fact. The tenant called evidence to prove that the shop was in existence as far back as 1948 when he first moved in and that in 1954 the landlord merely repaired it. The landlord called evidence that in 1953 the whole shop was demolished, the site raised three feet and a brand new shop and three other new shops were built on the same site. The landlord called the builder himself to corroborate this evidence. The nature of the evidence called is such that it would be wrong of this court to disturb the learned President's finding that the shop was a new building completed after 31st January, 1948, and I would therefore respectfully uphold that finding.

It is further argued that the learned President should have found that the landlord had illegally demolished and rebuilt the shop without the permission of the President or Chairman of the Rent Assessment Board and that therefore it remained rent-controlled premises. Whether or not the landlord has illegally demolished the shop and rebuilt it, is a question of fact. It should have been pleaded but it was not, and consequently the attention of neither counsel was directed to the necessity of calling evidence or cross-examining either to establish or rebut this allegation. Reference to the notes of evidence and the notes of argument in the Sessions Court shows that counsel and the court were concerned only with the question when this shop was built. In view of this I do not think that it is open to the tenant to raise this argument on appeal in the High Court or here.

It is next argued that the court should have held that the tenant had not surrendered his tenancy, presumably of the original shop. Again this is a question of fact which should have been but was not pleaded, and it is too late for the tenant to raise this objection in the High Court or here.

It is finally argued that the tenant remained a protected tenant as his tenancy had not been terminated according to law. This argument presumably also refers to the tenancy of the old shop. This too in my opinion should have been pleaded but was not, and I do not think that the tenant should be allowed to raise this objection in the High Court or here.

Pleadings must state facts and not law. But where a particular statute is relied on as the foundation of a defence, the facts necessary to bring the defence within the statute should be pleaded.

That was not done here save with regard to the question when this shop was built.

It should be observed that the tenant was well represented in the trial court by very experienced counsel, and if there had been anything in the points attempted to be raised on his behalf in the High Court and before us, it is not likely that they would have been overlooked by Datuk S. P. Seenivasagam.

I would therefore dismiss this appeal with costs and order that the appellant's deposit be paid to the landlord's representative against his taxed costs.

Wan Suleiman F.J. concurred.

Ali F.J.: This appeal arose out of a retrial ordered by the Federal Court in *Mohamed bin Myddin* v. *Teo Mek Yok*.[1] The dispute between the parties is over right of possession of premises No. 7, Jalan Ulu Market, Tanah Merah, Kelantan. The main question in the dispute is whether the said premises is or is not controlled premises. In the first trial the owner of the premises, Teo Mek Yok (f) who had since died, sought to recover possession from the tenant, the appellant, on the ground that the contractual tenancy in respect of the premises had been terminated by notice on March 31, 1965. Her claim was on the footing that the premises is not controlled premises. The defence was that it is and that upon the termination of the contractual tenancy the appellant became a statutory tenant by reason of the Control of Rent Ordinance, 1956, which was then in force.

The owner succeeded in obtaining judgment. An appeal against the judgment was dismissed by the High Court but was subsequently allowed by the Federal Court which ordered the retrial. On page 285 of the report referred to above the Federal Court summarised the case in these words:

"The defendant's claim was that in 1953 the premises were merely renovated and that the tenancy continued without a break after that. Since the old premises were erected prior to 1948 and consequently protected by the Control of Rent Ordinance, 1956 the new premises continued to enjoy the same protection. After hearing the evidence the learned president came to the conclusion that the building in question was actually re-built in 1953 and had, therefore, lost the protection of the Ordinance. He also came to the conclusion that the tenancy of the old premises had been terminated upon the demolition of the old house."

In allowing the appeal the Federal Court held that the trial President erred on the question of onus of proof.

The retrial was held in 1967 and was conducted in the manner decided by the Federal Court. On the only issue as agreed by counsels for both parties, the President concluded in these words:

"After hearing the whole case I found that on the balance of probabilities the defendant had not discharged the onus of proving that the premises were those same ones built before 1948. The story of the plaintiff and the evidence adduced in support were consistent with the truth and that a prudent man could not come to any other conclusion but that No. 7 Jalan Ulu Market was now an entirely new building."

The High Court, on appeal, agreed with this conclusion and dismissed the appeal. The appellant has now appealed to this court.

Before the High Court there were six grounds of appeal. Before us the same six grounds and two more were advanced. The first three, both here and below, are concerned with burden of proof. Although this might be said to have been settled by the Federal Court which ordered the retrial, the appellant sought to rely on another decision of Federal Court in *Leong Yoong* v. *Lee Sem Yoong*[2] which seems to be in conflict with *Mohamed bin Myddin* v. *Teo Mek Yok*.[1] In view of the judgment of the trial President, particularly the passage referred to above, the learned appeal judge was, however, satisfied that the President had not erred on burden of proof. I think so too. It is clear from the President's judgment that he accepted the plaintiff's evidence as true and rejected the appellant's evidence as untrue. The words "balance of probabilities" and "consistent with the truth" would seem to suggest this. I have no doubt that this finding was a finding based on credibilities of witnesses which the High Court did not think it right to interfere with. For myself I do not see any reason why it should be interfered. In view of this all arguments on burden of proof, important as they are, will not have any effect on the decision of this case. The first three grounds of appeal, therefore, fail.

The fourth ground so far as it is a complaint that the finding of the trial court was against the weight of evidence must also fail for the reason stated above.

The fifth ground is on costs as awarded by the trial court. The learned appeal judge said if the premises in question is not controlled premises the award could not obviously be contrary to the provisions of the Control of Rent Ordinance, 1956. With respect I agree and would reject this ground.

The sixth ground of appeal criticises the trial President and the appeal judge for not holding that the old premises was illegally demolished and the new premises illegally erected. This criticism is apparently based on the assumption that the demolition and erection had no local authority's approval. The evidence either way was not clear. Tanah Merah is a district in Kelantan. According to the evidence of the contractor who built the new building the plan was passed by the district officer. The clerk of the local council in the district could only produce an application by the plaintiff's husband to build the new premises. He said the correspondence and file relating to this were missing. The appellant was not in a position to show whether or not local council's approval had been obtained. Since his counsel did not raise it the trial President did not consider it. But it was raised at the hearing of the appeal. The learned appeal judge considered it despite objection by the respondent. After referring to the relevant legislations on the establishment of local councils he concluded against the appellant and rejected this ground. I would do same for the reason that I do not find any merit or substance in the appellant's contention. The cases cited were on different facts and are distinguishable.

The seventh ground states that the learned appeal judge erred in holding that the appellant has surrendered the tenancy of the premises. I have no doubt that this was an inference drawn from the following facts. There was an admission by the appellant that in 1953

he was not paying any rent in respect of the old premises. He said the owner had agreed not to collect rent. He also said this:

"Before plaintiff started repairs she agreed to let me occupy the premises after completion. In June 1953 the rent was increased to $85.00."

The inference reasonably to be drawn is that the appellant had not been forced out of the old premises. Since the fact as found by the trial President was that the old premises had been completely demolished and a new building erected the learned appeal judge had rightly inferred that the appellant has surrendered the tenancy or voluntarily gave the owner vacant possession of the old premises in order that she could build the new premises. In June, 1953 when he occupied the new building at an increased rent of $85 he was on a new tenancy. One of the reasons for this view is that section 2 of the Control of Rent Ordinance, 1956 excluded new buildings completed after 31st January, 1948 from the definition of "premises" and therefore from the operation of the Ordinance particularly section 12 which restricts order of possession to certain specified cases. Another reason is that on the inference drawn by the appeal judge from the facts which I think is reasonable the principle as applied in *Phillips* v. *Barnett*[3] must also be applied here. In that case three dwelling houses subject to the restrictions imposed by the Rent (Restrictions) Act, 1915 were demolished by the owner after obtaining vacant possession. On the site he built a factory which was let at a rent higher than the standard rent for the demolished houses. The claim by the tenants of the factory to recover rents in excess of the standard rent failed. The Court of Appeal held that the factory which was a new building was not subject to the restrictions imposed by the 1915 Act. Counsel's argument that the restrictions inhere in the site of the demolished houses was rejected as a mistaken view. Grounds 7 and 8, therefore, fail.

The case of *Tioh Kooi Lan* v. *Ismailjee*[4] has been referred to in arguments. All that I need say about *Ismailjee's* case is that it did not establish any general principle which can be applied here. It merely decided that on the facts of that case the test applied by the trial court for the purpose of section 4(2) of the Control of Rent Act, 1966 did not arise for consideration.

With respect I conclude by saying that I agree with the learned Lord President that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Mohamed Yaacob, Ibrahim & Gomez; Wrigglesworth & Co.*

PUBLIC PROSECUTOR v. LOH AH HOO

[A.Cr.J. (Syed Othman J.) August 21, 1974]
[Johore Bahru — Criminal Appeal No. 3 of 1973]

Criminal Law and Procedure — Offence under Customs Act, 1967 — Jurisdiction — Acts done outside jurisdiction continuing within jurisdiction — Whether triable in Malaysia — Customs Act, 1967, s. 135(1)(g).

In this case the respondent had been charged with some others for having been knowingly concerned in an attempt at fraudulent evasion of custom duty on 15 cases of playing cards, an offence under section 135(1)(g) of the Customs Act, 1967. The facts showed that the respondent ordered the goods from Naafi, Singapore; he was responsible for the preparation of the customs declaration although it was signed by the Naafi Chief Clerk; he was present at the loading of the goods in Singapore; and he was present when the Customs carried out investigation and could not give an explanation as to why the goods were not the same as in the declaration. The Sessions Court acquitted the respondent as it found that the acts of the respondent were not committed within the jurisdiction. The Public Prosecutor appealed.

Held: (1) if a person's criminal act or responsibility for the criminal act runs from outside jurisdiction to within jurisdiction then he is liable to be tried in Malaysia;

(2) in this case the respondent was responsible for the preparatory acts done in Singapore and those acts culminated within the jurisdiction, when the goods and the declaration for which the respondent was responsible reached the customs at Johore Bahru; therefore he was responsible;

(3) the order of acquittal should therefore be set aside and the respondent called to enter on his defence.

Cases referred to:-

(1) *Lee Szu Yin* v. *Public Prosecutor* [1962] M.L.J. 49.

(2) *Public Prosecutor* v. *Yong Nam Seng* [1964] M.L.J. 85.

(3) *R.* v. *Oliphant* [1905] 2 K.B. 67.

(4) *R.* v. *de Marny* [1907] 1 K.B. 388.

CRIMINAL APPEAL.

Ahmad Fadzil (Deputy Public Prosecutor) for the appellant.

A. L. Looi for the respondent.

Syed Othman J.: Four persons were charged in the Sessions Court at Johore Bahru with an offence under section 135(1)(g) of the Customs Act, 1967 of having been knowingly concerned in an attempt at fraudulent evasion of customs duty on 15 cases of playing cards. They were (1) the chief clerk of NAAFI in Singapore, (2) the driver of the lorry which transported the goods, (3) the lorry attendant, and (4) the respondent, who was the purchasing agent in Singapore for NAAFI, Kuala Lumpur. At the close of the case for the prosecution, (2) and (3) were acquitted. (1) the chief clerk and (4) the respondent were called to enter on their defence. But upon further submission by counsel for the respondent, the learned president decided that the acts committed by the respondent did not constitute an offence within the jurisdiction of the court and acquitted him. After hearing the chief clerk, he found him guilty and bound him over to be of good behaviour under section 173A Criminal Procedure Code for one year

The appeal is against the acquittal of the respondent.

The case for the prosecution briefly was as follows. On the morning of 5th February, 1972 the respondent